damaged or destroyed within the statute.[26] But further than determining that a human life is not property, within the statute,[27] the courts have not been called upon to construe the meaning of that term until the recent case of *Wells Fargo & Co.* v. *Mayor* (C. C. A., 3rd Cir. 1915) 219 Fed. 699. Here the plaintiff sought to recover for injury done to its business, as well as for the destruction of its tangible property. While conceding that as a matter of abstract reasoning, property "is a right to use, enjoy, and control, and therefore is neither visible nor tangible," the court came to the conclusion that this was not the sense in which the New Jersey legislature employed the term in the statute, and therefore recovery for damages to plaintiff's business was denied.

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ACCOUNT BOOK AND REGULAR ENTRIES IN MODERN BUSINESS.—The exception to the hearsay rule which allows the admission of business entries divides itself into two branches, which, though often confused, are distinct in their development and operation. The older of these branches is the account book rule, which allows the shop books of a party to an action to be introduced to show goods delivered or services performed. The custom of receiving such evidence arose in England at an early date, when parties were incompetent to testify and the average shopman had no clerk to take the stand for him, and was based on the necessity for providing some means of proving his daily dealings.[1] Although Parliament, realizing the dangers inherent in such self-serving evidence, early curtailed its use,[2] it has survived in some of the lower courts of England and became well established in the early law of most of our States.[3] The necessity on which it was based has ceased, but the old rule has continued in force subject to statutory modifications[4] and local variations.[5] The original necessity of giving some evidence to the ineligible principal disappears when

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[26]Sarles *v.* Mayor (N. Y. 1866) 47 Barb. 447; Spring Valley Coal Co. *v.* Spring Valley (1896) 65 Ill. App. 571.

[27]Note 12, *supra.*

[1]See Waggeman *v.* Peters (1859) 22 Ill. 42.

[2]Stat. 7 Jac. I, c. 12 (1609).

[3]Foster *v.* Sinkler (S. C. 1787) 1 Bay 40; Sickles *v.* Mather (N. Y. 1838) 20 Wend. 72; Fielder *v.* Collier (1853) 13 Ga. 496; *contra,* Hissrick *v.* McPherson (1855) 20 Mo. 310, since changed by statute, Anchor Milling Co. *v.* Walsh (1891) 108 Mo. 277.

[4]2 Wigmore, Evidence § 1561 says: "It is perhaps vain to attempt to construe statutes whose framers themselves seem not to have understood precisely the bearing of their enactments."

[5]The book must ordinarily be verified by the suppletory oath of the party keeping it, if alive, Roche *v.* Ware (1886) 71 Cal. 375; Townsend *v.* Coleman (1858) 20 Tex. 817, but New York and New Jersey do not require it. Sickles *v.* Mather, *supra.* The New York Courts require that a foundation be laid "by proving that the party has no clerk, that some of the articles charged have been delivered, that the books produced are the account books of the party, and that he keeps fair and honest accounts, and this by those who have dealt and settled with him" on the strength of said account books. Vosburgh *v.* Thayer (N. Y. 1815) 12 Johns. 461. See Chicago etc. R. R. *v.* Provine (1883) 61 Miss. 288.

there is a clerk competent to testify, and many courts limit the admission of account books in cases where no clerk is kept.[6] It appears, then, that this is a limited doctrine, established to meet the obsolete situation of a party's incapacity to testify, and should not be extended, whatever may be the merits of a general reception in evidence of business records, whether of parties or of third persons.

The other branch, the admission of regular entries made in the course of business, by persons since deceased, had its origin at the beginning of the eighteenth century, the distinction from the account book rule being recognized from the start.[7] The basis of this exception to the hearsay rule lies in the necessity of providing some form of evidence of transactions, a knowledge of which was confined to persons now dead.[8] The ordinary statements of deceased persons would be as dangerous as any other form of hearsay, but entries in the regular course of business are deemed more trustworthy, especially where the entries are made in the execution of a duty,—a requirement in England and some American States.[9] However trustworthy, this form of evidence is merely a substitute for that of the witness himself and its admission is based on the impossibility of producing the witness in person. Although originally limited to cases where the entrant was dead the rule has been naturally extended to cases where he is insane, and even where he is out of the jurisdiction.[10] The necessity for such evidence, being based on the impossibility of producing the entrant, is as great to-day as ever.

As business has grown more and more complex and the transactions of commercial enterprises have become too extensive to be retained in the actual recollection of any witness, the practical importance of shop books has increased and the courts have shown a strong desire to admit any business records of whose accuracy they

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[6]Waggeman *v.* Peters, *supra*; but this does not include a bookkeeper, McGoldrick *v.* Traphagen (1882) 88 N. Y. 334, nor an employee who merely delivers the goods. Sickles *v.* Mather, *supra*.

[7]Pitman *v.* Maddox (1699) 1 Ld. Raym. 732; Price *v.* Torrington (1703) 2 Ld. Raym. 873.

[8]"The ground is the impossibility of obtaining the testimony, and the cause of such impossibility seems immaterial." per Shaw, C. J., in North Bank *v.* Abbot (Mass. 1833) 13 Pick. 465. Some courts base it on the *res gesta* theory, Chisholm *v.* Beaman Machine Co. (1896) 160 Ill. 101; Robinson *v.* Smith (1892) 111 Mo. 205; State *v.* Central etc. Bridge Co. (1912) 49 Ind. App. 544, but this explanation is inadequate in cases where the entry is not contemporaneous with the admissible act.

[9]England requires a duty to enter the very thing sought to be proved, Chambers *v.* Bernasconi (1834) 1 C. M. & R. *347; Smith *v.* Blakey (1867) L. R. 2 Q. B. *326, but in the United States it is generally sufficient that the entry be made in the course of business, Nicholls *v.* Webb (1823) 8 Wheat. 326; Fisher *v.* Mayor (1876) 67 N. Y. 73; but see Kennedy *v.* Doyle (Mass. 1865) 10 Allen 161. In England the entries of a principal cannot come in unless he is under a duty to a third person. Queen *v.* Worth (1843) 4 Q. B. 132; see Patteshall *v.* Turford (1832) 3 B. & Ad. 890.

[10]Insane, Bridgewater *v.* Roxbury (1886) 54 Conn. 213; out of the jurisdiction, North Bank *v.* Abbot, *supra*; see State *v.* Central etc. Bridge Co. *supra*; but illness seems to be insufficient, see Taylor *v.* Chicago etc. Ry. (1890) 80 Iowa 431.

feel morally certain.[11] The hearsay exception enumerated in the foregoing paragraphs have been called upon to justify the reception of such records, but unfortunately the expansion so attempted has not always been in accordance with any settled scheme of development. However, if we accept the theory that entries in the course of business are admitted on account of the impossibility of producing the witness, it would seem reasonable to extend the application of the rule to cases where the impossibility depends on the large number and shifting characters of the employees of a great industry.[12] This development of the rule is shown in the recent case of *State* v. *Virgens* (Minn. 1915) 151 N. W. 190, where in a trial for murder, the card indexes of a large mail order house, identified by the department manager, were admitted to show the sale of a revolver, on the ground that it would be impossible, or at least highly impractical and undesirable, to identify and call the clerks keeping the records. Since the entrant, if available, can testify from the record as supplementing his memory,[13] a rule allowing the entry itself where the entrant cannot be produced provides sufficient opening for the admission of business records. It must be noted that the requirement of personal knowledge on the part of the entrant,[14] first relaxed in cases where the entries are made by a bookkeeper from regular memoranda of clerks who take the stand,[15] has been apparently lost sight of in some of the later cases, where the clerks are not accounted for.[16] This holding should at least be limited to the cases where the production of the clerk is rendered impossible, whether by death or the complexities of business.

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ELEMENTS OF IRREPARABLE INJURY TO LAND.—Although formerly courts of equity were slow to issue writs of injunction except in cases of waste, it is now well settled that this relief will be granted where irreparable injury to the complainant's land is threatened.[1] But there

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[11]Swedish-American Nat. Bank *v.* Chicago, B. & Q. Ry. (1905) 96 Minn. 436; Caton, C. J., in Waggeman *v.* Peters, *supra*, says: "There has been a growing disposition to open the door wider and wider, for books of account as evidence, till now it seems to be thrown down altogether, and the original consideration of necessity, which first introduced them, is altogether lost sight of." See Morrow *v.* Missouri Pacific Ry. (1909) 140 Mo. App. 200.

[12]Northern Pacific Ry. *v.* Keyes (C. C. 1898) 91 Fed. 47; Continental Nat. Bank *v.* First Nat. Bank (1902) 108 Tenn. 374; Seaboard Air Line Ry. *v.* R. R. Commissioners (1910) 86 S. C. 91; see Townsend *v.* Pepperell (1868) 99 Mass. 40.

[13]15 Columbia Law Rev. 468; Gardner *v.* Springfield etc. Co. (1911) 154 Mo. App. 666.

[14]Dykman *v.* Northbridge (N. Y. 1894) 80 Hun 258; Connecticut etc. Ins. Co. *v.* Schwenk (1876) 94 U. S. 593; Schnellbacher *v.* McLaughlin Plumbing Co. (1903) 108 Ill. App. 486.

[15]Mayor *v.* Second Ave. R. R. (1886) 102 N. Y. 572; Miller *v.* Shay (1887) 145 Mass. 162.

[16]Fielder *v.* Collier, *supra*; United States *v.* Cross (1892) 20 D. C. 365; see Hoover *v.* Gehr (1869) 62 Pa. 136.

[1]An injunction was first allowed in the case of trespass on the grounds that the threatened injury was irreparable in Flamang's Case which was followed in Mitchel *v.* Dors (1801) 6 Ves. Jr. *147, and referred to in Hanson *v.* Gardiner (1802) 7 Ves. Jr. *305, *308.